COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1685 **Cir. Ct. No. 01 CV 9017**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LESAFFRE YEAST CORPORATION,
A DELAWARE CORPORATION,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE METROPOLITAN SEWERAGE
DISTRICT, A WISCONSIN GOVERNMENTAL BODY,

DEFENDANT-RESPONDENT,

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Lesaffre Yeast Corporation appeals from a summary judgment granted in favor of the Milwaukee Metropolitan Sewerage District (MMSD), dismissing its complaint against MMSD alleging inverse condemnation and nuisance. Lesaffre claims the trial court erred in granting

summary judgment because it applied the wrong legal standards to reach its conclusion that MMSD was entitled to judgment as a matter of law. Lesaffre argues that under the correct legal standards, disputed issues of material fact exist and therefore the grant of summary judgment was premature. Because there are material issues of disputed fact, the summary judgment is reversed and cause remanded for further proceedings consistent with this opinion.

BACKGROUND

¶2 Lesaffre alleged in its complaint against MMSD that its Red Star Yeast & Products plant has been in the business of producing yeast in the City of Milwaukee for over one hundred years. In 1948, Red Star installed a 1700-foot deep, high capacity production water supply well, which draws water from both the shallower Silurian Dolomite Aquifer and the deeper Sandstone Aquifer. The well served as a source of low-cost cooling water, essential to the yeast manufacturing process.

¶3 Lesaffre's complaint further alleged that MMSD constructed the Deep Tunnel in the Silurian Dolomite Aquifer.[1] The Crosstown segment of the tunnel runs within 660 feet of the Red Star well. Lesaffre contends that as early as 1981, MMSD knew that the operation of the tunnel in that vicinity would contaminate Red Star's well because the tunnel walls are hewn through unlined bedrock. Fractures in the bedrock walls provide a channel through which sewage containing E. coli and other fecal coliform bacteria can migrate in and out of the

[1] The Deep Tunnel was built and is utilized to relieve peak flow demand on the existing sewer system by collecting and storing storm water overflow and excess sewage until it can be transported to MMSD's sewage treatment plants.

tunnel, flow into the aquifer, and into the Red Star well. Lesaffre also contends that MMSD officials knew that contamination of the well would occur and, during the 1980's, one official suggested that the City of Milwaukee condemn the well and provide Red Star with an alternate water supply.

¶4 MMSD began operation of the Deep Tunnel in 1994. In 1996, the complaint alleges that MMSD adopted a policy of notifying Red Star whenever the Deep Tunnel experienced a surge in pressure or surcharge, which was likely to result in exfiltration from the tunnel. In late 1993, Red Star tested its water supply to determine the well condition and ground water quality. Those samples showed no coliform or fecal coliform contamination. Later, in 1996, when MMSD notified Red Star of a surge in pressure, Red Star sampled the well water and detected coliform bacteria; however, the presence of coliform bacteria typically subsided after a few days and eventually disappeared.

¶5 In spring 1999, samples from the Red Star well consistently tested positive for total coliform bacteria, fecal coliform, and E. coli. Red Star immediately discontinued use of the well and increased its use of city water. Red Star attempted to chlorinate the well to kill the bacteria. The chlorination attempts were unsuccessful and the well could not be used again. Red Star alleges that the cracks in the walls of the tunnel enlarged over a period of time, resulting in a continuous discharge of bacteria laden water into the bedrock, aquifer, and the Red Star well. Red Star's complaint alleged that MMSD failed to properly operate the Deep Tunnel so as to prevent the contamination of its well, that MMSD's operation violates the environmental permits, and that as a result of MMSD's actions, it has effectively "taken" the well from Red Star.

¶6 MMSD filed an answer, and subsequently a motion seeking summary judgment. MMSD's position was that, even assuming the facts in the complaint to be true, judgment should be granted in its favor because Lesaffre failed to satisfactorily plead all the elements necessary to support a claim for inverse condemnation; further, MMSD asserts that Lesaffre's nuisance claim is barred by governmental immunity. The trial court agreed with MMSD and granted its motion for summary judgment. It entered judgment dismissing Lesaffre's complaint. Lesaffre now appeals from that judgment.

DISCUSSION

¶7 This appeal arises following a grant of summary judgment. Our standard of review of such appeals is well-known. We review the trial court's decision independently, using the same methodology as the trial court. ***R.W. Docks & Slips v. State***, 2001 WI 73, ¶12, 244 Wis. 2d 497, 628 N.W.2d 781. We will affirm the trial court's decision to grant summary judgment if there are no genuine issues of material fact and if the "moving party is entitled to judgment as a matter of law." ***Id.*** (citation omitted).

¶8 At this point in the proceedings, we cannot conclude that MMSD is entitled to judgment as a matter of law. Accordingly, we reverse the judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

¶9 The trial court granted summary judgment because it concluded that Lesaffre failed to sufficiently allege the elements necessary to constitute a "taking" in an inverse condemnation action, and because it concluded that MMSD was entitled to governmental immunity on the nuisance cause of action. We conclude that the trial court erred.

¶10 The law of "takings" and inverse condemnation is rather complex and each case is factually unique, and presents a question which cannot

> be answered in such a way as to furnish a concise rule readily applicable to all cases likely to arise. Each case must be decided on its own merits until, by the gradual process of judicial exclusion and inclusion, it is possible to say on which side of the line any given injury to private property rights may be said to fall.

More-Way N. Corp. v. State Highway Comm'n, 44 Wis. 2d 165, 174, 170 N.W.2d 749 (1969) (citation omitted). In the instant case, MMSD argued successfully to the trial court that the facts alleged fall into a category of cases described as "constructive takings with physical invasion." Lesaffre responds that no such category exists in the law of this state. From our independent review of the pertinent case law, we conclude that Lesaffre is correct.

¶11 The "takings" cases essentially fall into one of three categories: (1) physical takings, which are actionable; (2) regulatory takings, which are actionable; and (3) consequential damage cases, which are not actionable. *See* ***Kohlbeck v. Reliance Constr. Co.***, 2002 WI App 142, 256 Wis. 2d 235, 647 N.W.2d 277 (*e.g.*, physical taking); ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 548 N.W.2d 528 (1996) (*e.g.*, regulatory taking); and ***Wisconsin Power & Light Co. v. Columbia County***, 3 Wis. 2d 1, 87 N.W.2d 279 (1958) (*e.g.*, consequential damage). Although the term "constructive taking" is used on occasion by the courts, it is never used as MMSD contends.

¶12 MMSD suggests that the ***Zealy*** case supports its claim that there is a distinction between physical takings and constructive takings with physical invasion. We disagree. Although the term "constructive taking" is used in ***Zealy***, it was used to describe a "regulatory taking," which involved a zoning restriction

for conservancy placed on Zealy's land. ***Zealy***, 201 Wis. 2d at 369-71. MMSD's attempt to create a "constructive taking" category was erroneous. As a result of MMSD's representations, the trial court erroneously applied "regulatory takings" law to this case, and found that the complaint failed to sufficiently plead a cause of action for a regulatory taking.

¶13 The problem leading to MMSD's, and hence the trial court's error, is that the allegations in the instant case do not fall squarely into the physical takings cases. MMSD did not physically acquire the Red Star well. The allegations contend that MMSD's operation of the Deep Tunnel physically took the Red Star well by polluting the groundwater and aquifer, which effectively rendered its well unusable. Nevertheless, the allegations presented in the complaint fall closer to the physical takings category than they do to the regulatory takings category. Accordingly, the case should have been decided utilizing the former case law for guidance. It was not.

¶14 Utilizing the correct case law, we conclude that it was premature to dismiss this case on summary judgment. As Lesaffre points out, there are several issues of material fact in dispute. One disputed issue is whether the operation of the Deep Tunnel is the source of the contamination of the Red Star well. If it is not the source, then obviously there was no "taking." Another disputed issue involves the frequency of contamination over the period of time in question. Is the contamination sporadic or ephemeral? Moreover, the parties dispute whether MMSD had the knowledge to create the conditions that caused the contamination of the well. Did MMSD know that operating the Deep Tunnel would result in contamination of the ground water, aquifer and Red Star's well? Did MMSD know that if it did not line the Crosstown part of the tunnel with concrete that Red Star's well would have to be shut down, or was the contamination merely an

accidental event which justifies a finding of incidental consequential damage rather than a physical taking? These are all questions of fact, which need to be resolved in order to determine whether a physical taking occurred, and to determine on which "side of the line" this case will fall.

¶15 Based on the foregoing, the trial court erred when it concluded as a matter of law that MMSD was entitled to a judgment dismissing Lesaffre's complaint. We also hold that the trial court erred when it concluded that Wisconsin does not recognize a cause of action for a temporary physical taking. It does. *See* ***Andersen v. Village of Little Chute***, 201 Wis. 2d 467, 549 N.W.2d 737 (Ct. App. 1996). Because material issues of fact exist with respect to that claim, it was premature to dismiss it.

¶16 Finally, we hold that the trial court erred when it concluded as a matter of law that the nuisance action is barred because of governmental immunity. The doctrine of immunity does not generally bar a claim for the creation of a private nuisance. ***Anhalt v. Cities and Villages Mut. Ins. Co.***, 2001 WI App 271, ¶21, 249 Wis. 2d 62, 637 N.W.2d 422. The trial court, however, ruled that because the design of the Deep Tunnel constituted a "discretionary act," MMSD was immune from the nuisance claim. The problem with the trial court's ruling, is that Lesaffre's nuisance claim was not premised solely on the *design* of the Deep Tunnel. Lesaffre contends that the *operation* of the tunnel creates a private nuisance. Specifically, the complaint alleges that such operation has occurred "in disregard of [MMSD's] statutory authority, its operating permits, the Deep Tunnel operation and maintenance manual and its common law duty to the public and Plaintiff not to contaminate the groundwater."

¶17 Thus, the complaint alleges violations of ministerial duties, which are not immune from suit. ***Menick v. City of Menasha***, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996) ("there is no discretion as to maintaining the [sewer] system so as not to cause injury to residents").

¶18 Accordingly, the trial court erred when it granted summary judgment; we reverse the judgment and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.